IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-854

MARK SAMUEL BERGER,

Petitioner,

V.

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

BRIEF OF PETITIONER

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No. _____

MARK SAMUEL BERGER,

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BRIEF OF PETITIONER

The petitioner, Mark Samuel Berger, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the State of Georgia.

OPINIONS BELOW

On May 3, 1979, the Georgia Court of Appeals rendered a decision affirming the denial of Petitioner's Motion to Suppress. *See* Appendix A. On June 5, 1979, Petitioner's Motion for Rehearing was denied in the same court. *See* Appendix B. Petitioner filed his application for a Writ of Certiorari in the Georgia Supreme Court on July 5, 1979, and the application was denied on September 4, 1979. *See* Appendix C.

JURISDICTION

Jurisdiction of this appeal is grounded in a May 3, 1979 decision of the Georgia Court of Appeals. The statutory provision conferring jurisdiction for this appeal is 28 U.S.C. 1257.

QUESTION PRESENTED FOR REVIEW

WHETHER PETITIONER WAS DENIED HIS FOURTH AMENDMENT RIGHT TO BE SECURE FROM UNREASONABLE SEARCHES AND SEIZURES WHERE OFFICERS SEARCHED PETITIONER'S BRIEFCASE IN WHICH HE HAD A PRIVACY INTEREST AND WHERE DENIAL OF PERMISSION TO SEARCH THE BRIEFCASE WAS UNEQUIVOCAL.

CONSTITUTIONAL PROVISION INVOLVED

Fourth Amendment, United States Constitution:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

PREFATORY STATEMENT

All references to the record in this case will be preceded by the capital letter "R;" all references to the transcript of the "Motion to Suppress" hearing will be preceded by the capital letter "T;" and all references to the May 8, 1979 Preliminary Hearing will be preceded by the capital letter "H."

STATEMENT OF THE CASE

Petitioner was charged with violating the Georgia Controlled Substances Act. Petitioner filed a Motion to Suppress Evidence alleging that the warrantless search of his briefcase which occurred was in violation of his Fourth Amendment rights. On November 3, 1978, the trial court entered its Order denying Petitioner's Motion. The trial court certified, however, that an immediate review of the suppression issue was appropriate. An interlocutory appeal was granted on December 12, 1978 and on May 3, 1979 the Georgia Court of Appeals rendered a decision affirming the denial of Petitioner's Motion to Suppress. Subsequently, Petitioner filed his application for a Writ of Certiorari in the Georgia Supreme Court on July 5, 1979 and the application was denied on September 4, 1979.

Petitioner respectfully submits the following chronology with respect to the "search and seizure" issue presented here:

1. On May 1, 1978, the Petitioner, unable to secure lodging at the Regency Hyatt House in Atlanta, left his briefcase by the public telephones in the main lobby of the hotel for several minutes while trying to secure lodging elsewhere (R. 58). Before he returned, his briefcase was found and taken to the office of the Assistant Manager, Ron Thompson (T. 5). Thompson opened the briefcase in an attempt to acertain the owner's identity. Thompson observed business papers, a wallet, ink pens and a substantial amount of money (T. 6). Thompson closed the briefcase and went outside to the front desk area because he thought someone would claim it (T. 6). He saw the Petitioner walk to the telephones and then walk back toward the registration area (T. 7). The Petitioner asked

if anyone had turned in a briefcase in the last five or ten minutes (T. 7). Thompson approached Petitioner and walked him to his office (T. 7). Petitioner identified the briefcase as his and requested its return. Thompson refused to do so without personal identification. Thompson stated, however, that if Petitioner could have produced any form of identification, Thompson would have given him the briefcase (T. 20).

2. Two Atlanta policemen who worked evenings at the hotel, Sgt. W. F. Derrick and Officer J. T. Cochran, then entered the office and Thompson explained the situation to them. At the time they came into the room, a wallet belonging to Petitioner had been removed from the briefcase, and he held it in his hand while describing the contents of the wallet to Thompson (T. 61).

Both Thompson and Petitioner agreed that at the time Derrick and Cochran entered the office, the briefcase was closed (T. 17; 61); Cochran, however, could not remember (T. 72). Petitioner testified that he had his hands upon the briefcase at that point (T. 67). Even Derrick testified that the top of the briefcase "was mostly down" (T. 28).

Petitioner's driver's license was in his wallet, but since it was an out-of-state driver's license with no picture on it, Derrick had Berger sign his name to see if his signature matched that on the license. He did so, and Derrick conceded, "They looked pretty close to me" (T. 4, 6).

3. Both Petitioner and Thompson said that Derrick would still not let Berger have the briefcase. He asked Berger at that point if there was any reason why he should not further search the briefcase, and Berger replied that he would prefer it if he would not. Both agreed that Berger made this statement twice (T. 23, 24, 65). Nevertheless, Derrick searched the valise, and at this point he found a small quantity of marijuana (T. 66).

4. Sgt. Derrick testified that he, not Petitioner, had opened the briefcase and removed Petitioner's wallet himself. Petitioner did not object until after Derrick had observed marijuana in plain view in the open case (T. 28). This testimony, however, directly contradicted his earlier testimony at the May 9th preliminary hearing which was just eight days after the incident in question occurred. At the preliminary hearing, Derrick had not been able to testify that Petitioner only objected after the search: "It is hard to determine exactly when he said that." (H. 9).

5. At the Motion to Suppress hearing, Derrick also testified that while Berger was giving the handwriting sample, the case managed to stay open about 10 inches and that he was able to view three inches of a plastic bag that contained marijuana. This repudiated his prior testimony at the preliminary hearing. When asked exactly where the marijuana was in the briefcase, he answered:

> A. It wasn't sitting right on top. I was trying to find something, so we could give it to him. (H. 9).

6. As to whether the plastic bag of marijuana was in plain view, the testimony at the suppression hearing conflicted. Thompson had looked right into the case for identification, but observed no marijuana at all (T. 6). There was no testimony that the briefcase was moved after this point in a way that would jar the contents and shake the bag of marijuana into plain view. Petitioner testified that you could not see the marijuana immediately upon opening the briefcase, and that it had been stuffed down into the bottom of a compartment (R. 67). Cochran admitted that he could not see the contents. Derrick himself, at the preliminary hearing, said that the mari-

juana was "found," implying that he had to search for it, rather than it's being plain view. (H. 9).

Derrick did say that Petitioner told him that his identification was in the case and that he claimed the case as his; however, Petitioner never consented to Derrick's opening of the case (T. 34). In fact, as already mentioned, Petitioner twice stated, "I prefer that you not look in my briefcase."

8. The record shows that Derrick's testimony stands out as distinctly different from that of the other three witnesses, particularly on the crucial points of plain view and consent. Additionally, the trial court did not make "findings of fact," but instead, summarized the testimony of each witness who had appeared at the suppression hearing.

REASON FOR GRANTING THE WRIT

EXPLICATION OF *UNITED STATES V. CHADWICK* BY THIS COURT IS NECESSARY TO RESOLVE THE CRITICAL LEGAL QUESTION OF WHETHER THE POLICE VIOLATED PETITIONER'S EXPECTATIONS OF PRIVACY WHEN THEY SEARCHED A BRIEFCASE WHICH PETITIONER CLAIMED AS HIS OWN BUT WHICH HAD BEEN TEMPORARILY MISLAID. THIS COURT HAS NEVER BEFORE DECIDED THE EXTENT OF AN INDIVIDUAL'S PRIVACY RIGHT IN MISLAID PROPERTY, ESPECIALLY WHERE THE INDIVIDUAL AFFIRMATIVELY STATES THAT HE DOES NOT WANT POLICE TO SEARCH THE BRIEFCASE WHICH HE CLAIMS AS HIS OWN.

Warrantless searches and seizures are valid under certain exceptional circumstances. *See United States v. Edwards*, 415 U.S. 800, 39 L.Ed.2d 771 (1974); *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed.2d 564 (1971).

Sgt. Derrick's search of the Petitioner's briefcase was warrantless. Accordingly, the evidence he seized must be suppressed, unless the search was pursuant to a recognized exception to the warrant requirement. *See Katz v. United States*, 389 U.S. 347, 357 (1967). None of the exceptions to the warrant requirement will support the instant search.

A. PETITIONER HAD A PROTECTED PRIVACY INTEREST IN HIS BRIEFCASE WHICH WAS PROTECTED BY THE FOURTH AMENDMENT.

Petitioner had a privacy interest in the contents of his briefcase which was protected by the Fourth Amendment. *See United States v. Chadwick*, 433 U.S. 1, 53 L.Ed.2d 538 (1977). In *Chadwick*, the Supreme Court held unconstitutional the warrantless search of a locked footlocker that had been removed by federal agents from the trunk of a taxicab and taken downtown to the federal building before it was searched. The Court rejected the Government's invitation to fashion, by analogy to the automobile search cases, an exception to the warrant clause for personal luggage. The Court concluded that:

> Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum a person's expectations of privacy in personal luggage are substantially greater than in an automobile.

United States v. Johnson, 588 F.2d 147 (5th Cir. 1979), stands for the same proposition. In *Johnson*, the Court held that although agents had probable cause to believe the appellant's duffle bag contained marijuana, it was not subject to a warrantless search. The Court concluded that the appellants had a "protected privacy interest in the contents of the duffle bag" and that their expectations

of privacy as to the contents of the duffle bag were not diminished because it was loaded onto an aircraft.

In *United States v. Vickers*, 599 F.2d 132 (6th Cir. 1979), and *United States v. Farrar*, 470 F.Supp. 128 (S.D. Miss. 1979), the courts reiterated the holding in *Chadwick* and *Johnson*, *supra*, and stressed that an individual's expectations of privacy in personal luggage must not be undermined, especially where officers have "exclusive control" of the luggage.

Petitioner here had no less strong a privacy interest in his briefcase than did the *Chadwick* and *Vickers* defendants in their footlockers, the *Johnson* defendants in their duffle bag, or the *Farrar* defendants in their purse. Berger, accordingly, was no less protected by the warrant clause.

B. THE INTRUSION INTO PETITIONER'S BRIEFCASE WAS ILLEGAL.

At the close of the October 6, 1978, suppression hearing, the court indicated that the validity of the instant search turned on "whether there is a legal intrusion and therefore plain view sighting of illegal evidence." (T. 74). To determine whether or not there was a legal intrusion, it is necessary to classify Petitioner's interest in the briefcase. First, Petitioner's briefcase was *not* abandoned. As stated in *Croker v. State*, 114 Ga. App. 43, 44 (1966):

> Abandonment, of course, is largely a question of intent. *United States v. Wheeler*, 161 F.Supp. 193, 198 (W.D. Ark. 1958). Intent, in turn, is a question of fact.

The Fifth Circuit has addressed the issue as well and in *United States v. Colbert*, 474 F.2d 174, 176 (1973), the Court stated:

> [T]he issue is not abandonment in the strict property right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search. (At 176).

In *Colbert*, the defendants had abandoned briefcases containing sawed-off shotguns on a sidewalk, and when questioned by police, denied ownership. This disclaimer of interest in the briefcases was held sufficient to support the subsequent search. *See also United States v. Williams*, 569 F.2d 823 (5th Cir. 1978).

In the case at bar, there was clearly no intent to abandon the briefcase. Berger claimed from the first that the case was his, and expended considerable effort in attempting to regain it. (T. 2, 27, 60). The fact situation here is directly contrary to the one in *Colbert*, *supra*, where defendants had disavowed any connection with their briefcases.

The briefcase in the instant case was not abandoned or lost, but was misplaced:

> Mislaid property is intentionally put down by the owner and then forgotten while lost property is that which owner has parted with casually and involuntarily. *Roftano v. Duffy*, 291 F.2d 848 (2nd Cir. 1961).

The misplacement of the property in this case was wholly without intent. No abandonment ever occurred, and Petitioner never lost his expectation of privacy in the briefcase.

The record shows that there was sufficient information to corroborate that Berger was the owner of the briefcase even before Derrick wrongfully opened the case: (1) the hotel manager saw Berger walk to the telephones, look

around and ask at the registration desk if anyone had turned in a briefcase within the last five or ten minutes (T. 6-7); (2) Berger identified the briefcase by color (T. 7); (3) Berger was taken to the manager's office and identified the briefcase as his (T. 7); (4) no one else claimed the briefcase; (5) Berger requested the return of his briefcase (T. 7); (6) Berger stated that he had no identification on him but that his black, fold-over wallet was in the case (T. 8); (7) the manager had observed a wallet inside the case when he initially opened the case and *before* he approached Berger (T. 6). Not only did Petitioner appear to be the owner of the case; he claimed to be the owner; he was the owner and he, therefore had a property interest in the case. At a minimum, the circumstances were sufficient to put Derrick on notice that Berger was claiming his right to this property and that he could not open the briefcase without Petitioner's consent. While the search and seizure law recognizes abandonment as an exception to the warrant requirement, there is no such exception for lost or mislaid property. Although the trial court referred to the opening of the briefcase as a "limited intrusion," it is nonetheless an intrusion and in violation of Petitioner's Fourth Amendment rights.

C. PETITIONER DID NOT CONSENT TO THE SEARCH OF HIS BRIEFCASE.

Although the State contends that Petitioner consented to the search, this is not supported by the record, and the seizure of neither the marijuana nor the cocaine can be thereby excused.

Both the hotel manager and Berger testified that Berger *twice* told Derrick that he did not want him to open the valise (T. 23, 66). Derrick also admitted that Berger stated, "I don't want you searching my case." (T. 28).

At the preliminary hearing, Sgt. Derrick testified, "It is hard to determine exactly when he [Berger] said that." Even the trial court's order on the Motion to Suppress summarizes Derrick's testimony as follows:

> The defendant twice stated, 'I prefer that you not look in my briefcase.' The briefcase was ajar, but in order to reach in and get the wallet *Officer Derrick lifted the top of the brief case* and retrieved the described wallet, from which he then extracted a driver's license, bearing a signature. . . . (R. 43) (Emphasis added.)

It is clear that Derrick opened the case and rummaged through it, after he was requested not to by Petitioner. This was a blatant violation of the Fourth Amendment.

When the only reason offered by the State in support of a warrantless search is consent, the facts and circumstances must be strictly reviewed:

> Close judicial scrutiny of an alleged consent to search is necessary. This is particularly true under the circumstances of this case because it is difficult to imagine why an accused . . . would voluntarily permit officers to conduct a search . . . if he knows that incriminating evidence will be found.

Code v. State, 234 Ga. 90, 93 (1975).

The officer has an affirmative duty to ask for an owner's consent. At the moment he invades another's property he must be acting pursuant either to a warrant or to an exception. *See Jones v. United States*, 357 U.S. 493 (1958). If the State alleges that the owner gave permission to violate his privacy, it must show that it was specifically granted. The only way to ensure this is to request consent. The case, *Clare v. State*, 135 Ga. App. 281 (1975), involved the search of an apartment by a policeman who failed to

ask for consent. The court rejected the State's "implied consent" theory:

> Since the officer never sought defendant's permission to enter the apartment, we are unable to discern how defendant could possibly consent to the intrusion. The notion of 'implied consent' advanced in support of this search has no basis within the context of Fourth Amendment rights. (At 285).

In the absence of an affirmative answer to such request, no exception exists which allows the officer to circumvent the warrant requirement and conduct a search. Thus, "implied consent" cannot support the instant search.

Consent to the briefcase search was not given by the hotel manager or any other person, and would have been invalid in any case. *See Braddock v. State,* 127 Ga. App. 513, 517 (1972).

In the instant case, Petitioner's denial of permission to search was unequivocal. Any other response, in light of the fact that he knew that there was contraband within the briefcase, would have been senseless. Even if Derrick did remove the wallet from the briefcase himself, he had no authorization to do so from the man who stood there claiming ownership. Moreover, there was no request at that point, even by Derrick's own testimony, for consent to reach into the briefcase, an act which led to the discovery of contraband. Certainly, the procedure established by the hotel to establish property rights of a claimant cannot contravene the Fourth Amendment to the United States Constitution. As stated in *United States v. Lawson,* 487 F.2d 468 (6th Cir. 1973): "A police duty to safeguard the owner's property does not automatically give the police the right to search." (At 475).

The State completely failed to show consent to search

in this case, and the warrantless search of Petitioner's briefcase was constitutionally prohibited.

D. THE SEARCH OF PETITIONER'S BRIEFCASE DOES NOT FALL WITHIN THE PLAIN VIEW EXCEPTION TO THE WARRANT REQUIREMENT.

The Georgia cases are clear on this point: To properly seize an object in plain view, the officer must be where he has a right to be. *Peek v. State,* 239 Ga. 422 (1977). In the present case, Derrick was not rightfully within the briefcase. Derrick admitted that when he entered the office the briefcase was no more than three inches open (T. 34). He opened it himself without a warrant, and it was as a result of that invasion that he found marijuana (T. 35). As stated above, Derrick did not have Berger's consent to open the briefcase (T. 66).

Secondly, Derrick's testimony that the marijuana was in plain view is suspect in itself. Thompson had looked into the briefcase and saw nothing but a wallet, papers, pens and money (T. 6). Petitioner testified that you could not see the marijuana immediately upon opening the briefcase, and that it had been stuffed down into the bottom of a compartment (T. 67). Cochran admitted he could not see the contents. Derrick himself, at the preliminary hearing, said that the marijuana was "found," implying that he had to search for it, rather than its being in plain view. Finally, while Derrick testified that the briefcase had managed to stay open about ten inches, it seems unlikely that he was able to view a plastic bag that contained marijuana which "wasn't sitting right on top." (T. 9). Derrick stated at the preliminary hearing: "I was trying to find something, so we could give it [the briefcase] to him." (H. 9). Even if, contrary to the evi-

dence, the plastic bag within the briefcase was in plain view, Derrick's initial illegal entry into the briefcase tainted any subsequently discovered evidence.

Accepting, arguendo, that Derrick did plainly view contraband in the briefcase, he was required to secure a warrant at the moment he did so. There were no exigent circumstances in this case which required that the contraband be immediately seized to preserve it; with two policemen present, the situation was well in hand. "Plain view alone is never enough to justify the warrantless seizure of evidence." *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971). The officers should have obtained a warrant before proceeding further.

The trial court's order denying Petitioner's Motion to Suppress cites two cases which are clearly distinguishable from this case. *Kimbrough v. Beto*, 412 F.2d 981 (1969) upheld a conviction for illegal possession of contraband drugs. In *Kimbrough*, the only occupant of a wrecked vehicle was found unconscious. The officer checked the contents of the vehicle and the occupant's clothing to determine his identity. Unlike the instant case, the defendant was *unconscious*, and did not specifically object to the officer's intrusion into his belongings. In *Lowe v. State*, 230 Ga. 134 (1973), the defendant was not present and thus did not object to the officer's entry into his car.

CONCLUSION

Based on the foregoing reasons, the Petitioner contends that the Georgia Court of Appeals misapplied controlling authority to the circumstances involved in Petitioner's situation. Therefore, a Writ of Certiorari should issue to review the judgment of the Georgia Court of Appeals.

Respectfully submitted,

GARLAND, NUCKOLLS & KADISH, P.C.

BY: _____

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CERTIFICATE OF SERVICE

This is to certify that I have this day served Melvin Jones, Esq., Assistant District Attorney, Atlanta Judicial Circuit, with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This ____ day of _____, 19 ____.

_____

EDWARD T. M. GARLAND

APPENDIX A

57567. BERGER v. THE STATE

QUILLIAN, Presiding Judge.

This is an appeal, via the interlocutory route (Code Ann. § 6-701 (a)(2)(A) (Ga. L. 1965, p. 18; 1968, pp. 1072, 1073; 1975, pp. 757, 758)), from the denial of a motion to suppress.

The assistant manager of the Hyatt Regency Hotel was given a briefcase that had been found in the main lobby. It was closed but not locked. It was not an unusual occurrence to find several misplaced briefcases each day in the hotel. He opened the briefcase to see if it contained any identification of its owner. It contained a wallet, a large amount of "business papers" and "bundles of money." Two men who inquired about the briefcase were directed to his office. One man, the defendant, stated that it was his briefcase. The manager asked him if he had any personal identification. The defendant told him his identification was in the wallet in the briefcase. The manager stated that it was hotel policy that identification must be made from the person and not from the lost object and "if the person can't identify themselves, obviously we can't give it out." The manager was particularly concerned about this item because of the large amount of cash it contained. Both men were getting "agitated" and "a bit loud."

Police officers Derrick and Cochran, were employed by the hotel as security personnel while they were off duty. Officer Derrick received a call over his "beeper" and was directed to report to the assistant manager's office. Officer Derrick testified that when he arrived the assistant manager briefed him on the situation and he identified himself

to the defendant and asked him if the briefcase was his. The defendant stated that it was. Officer Derrick asked defendant if he had "any identification, driver's license or anything like that." The defendant "said it was in the briefcase . . ." According to Officer Derrick the briefcase was unlocked and "the top was mostly down." He "opened up the case, pulled out the billford" and *left the briefcase open.* Officer Derrick asked the defendant to write out his signature for comparison purposes. "As I was looking at the signatures on the driver's license and . . . the signature on the piece of paper, the case was right in front of me and I noticed there was a bag of what I thought was marijuana inside the case in the back of it . . . and [the defendant] saw me see the marijuana . . . that's when he said . . . "I don't want you to search the briefcase." On cross examination Officer Derrick admitted at the preliminary hearing he had testified that "It was hard to determine exactly when [the defendant] said [he didn't want him to look in the briefcase] . . . I don't know if he saw me see it, and then said it, or what." He reaffirmed his testimony given at the suppression hearing and on redirect acknowledged he had testified at the preliminary hearing: "My best recollection is it was almost at the same time when I saw it. He saw me see it, that's when I said you are under arrest and he said you cannot search my briefcase." Officer Cochran corroborated portions of officer Derrick's version of the event.

The defendant testified that when he was asked for identification by the assistant manager he took his wallet out of the briefcase and told the manager what was in it and at that time the officers came in. He stated the briefcase was closed and the wallet was in his hand. When asked for identification he showed officer Derrick his

driver's license and he signed his name to let the officer make a comparison. He testified that officer Derrick said: ". . . yeah, that's you all right . . . but that doesn't prove this is your briefcase . . . I am going to have to have to look in it . . . It was closed . . . I said I would prefer that you do not look in it." Although he repeated his request not to look in the briefcase the officer opened it and searched through the briefcase until he found the marijuana, cocaine, and $7,000 in cash. The court denied the motion to suppress. Defendant brings this appeal.

Held:

Defendant argues that warrantless searches and seizures are invalid except under recognized exceptions. Katz v. United States, 389 U.S. 347, 357 (88 SC 507; 19 LE2d 576). They contend that under United States v. Chadwick, 433 U.S. 1 (97 SC 2476, 51 LE2d 538) the defendant had a reasonable expectation of privacy in his briefcase which was protected by the Fourth Amendment. Counsel is correct in his interpretation of Chadwick where the U.S. Supreme Court held that federal agents violated the Fourth Amendment by searching a locked footlocker at the police station which was in possession of the defendant when he was arrested. However, Chadwick is inapposite under the facts. Here the defendant was not arrested, nor did he have the briefcase "in his possession." The briefcase had been misplaced. Innkeepers of this state have a statutory liability to guests for property coming into their possession. See Code Ann. §§ 52-108, 52-109 (Code §§ 52-108, 52-109). It is not an unauthorized search for hotel management personnel, including security personnel, to open unlocked items found on their premises in an attempt to determine ownership so that the lost or misplaced property can be returned to its proper owner. Nor

do we discern any difference in the situation here when the security officer was a police officer employed by the hotel in his "off-time." He was acting in his capacity as a hotel security officer and not attempting a search for incriminating evidence. In *Lowe v. State*, 230 Ga. 134, 136 (195 SE2d 919), a police officer at the scene of a fire had his attention directed to papers and a money bag in an automobile belonging to the defendant, which had been pushed away from the burning house. The officer confiscated the articles for "safekeeping [because] he had no idea whose property they were." The court held that the situation was "devoid of any implications of an unconstitutional search and seizure . . . [as] the incriminating evidence came into the possession of the law enforcement authorities inadvertently and unmotivated by any desire to locate incriminating evidence by any unlawful search and seizure." Id. at 136. In the same manner, in the instant case the incriminating evidence came into possession of the law enforcement authorities inadvertently and unmotivated by any desire to locate incriminating evidence. Assuming without deciding that officer Derrick was acting as a police officer, we find nothing unlawful about a police officer opening an unlocked, lost or misplaced item to determine ownership. The marijuana was then in plain view and the officer was authorized to confiscate the contraband. *Hatcher v. State*, 141 Ga. App. 756 (234 SE2d 388).

In his finding of fact the trial court determined: "The briefcase was ajar, but in order to reach in and get the wallet officer Derrick lifted the top of the brief case and retrieved the described wallet . . . With the brief case open some of the contents were in plain view. Sergeant Derrick noticed a clear plastic bag containing what ap-

peared to him to be marijuana. He then told the defendant he was under arrest . . ." In a motion to suppress, "[f]actual and credibility determinations of this sort made by a trial judge after a suppression hearing must be accepted by appellate courts unless such determinations are clearly erroneous." *Johnson v. State*, 233 Ga. 58 (209 SE2d 629). The trial court chose to believe the police officers' version of the sequence of events and there is evidence to support his findings. His findings are not "clearly erroneous." This enumeration is without merit.

Judgment affirmed. Smith and Birdsong, JJ., concur.

APPENDIX B

COURT OF APPEALS
OF THE STATE OF GEORGIA

ATLANTA, June 5, 1979

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

57567. Mark S. Berger v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS
OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA JUN-5 1979

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ MORGAN THOMAS, CLERK.

APPENDIX C

CLERK'S OFFICE,
SUPREME COURT OF GEORGIA

Atlanta SEP 04 1979

Dear Sir:

Case No. 35280; Berger v. The State

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur.

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

IN THE

Supreme Court of the United States

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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I N D E X

TABLE OF AUTHORITIES

(cites continued)

Statutes Cited

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ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS FOR THE STATE OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether Petitioner's rights under the Fourth Amendment were violated by the seizure of marijuana, in plain view, obtained by a hotel security officer during a routine check of a misplaced suitcase in order to determine ownership?

PART ONE

STATEMENT OF THE CASE

Petitioner, Mark Samuel Berger, was convicted of violating the Georgia Controlled Substances Act in the Superior Court of Fulton County, Georgia. Petitioner filed a pretrial motion to suppress, alleging that the search of his briefcase, which he had misplaced, by security officers at the Hyatt Regency Hotel in Atlanta, Georgia violated his rights under the Fourth Amendment. Following a hearing, Petitioner's motion to suppress was denied by the Superior Court of Fulton County, Georgia on November 3, 1978. Petitioner then pursued an interlocutory appeal to the Court of Appeals of Georgia alleging as error the denial of his motion to suppress the evidence recovered during the search of his briefcase.

The Court of Appeals of Georgia in its review of the case in Petitioner's interlocutory appeal made pursuant to Ga. Code Ann. § 6-701(a)(2)(A), reviewed the evidence which was produced before the trial court in the hearing on the motion to suppress and determined that the trial court's findings crediting the security officer's version of the events leading to the search, were not "clearly erroneous" and affirmed the denial of the motion to suppress by the trial court. Petitioner's motion for rehearing was denied by the Court of Appeals of Georgia on June 5, 1979.

Subsequently, Petitioner applied for a writ of certiorari in the Supreme Court of Georgia on July 5, 1979. Petitioner's application for writ of certiorari was denied on September 4, 1979.

The petition for a writ of certiorari presently before this Court seeks review of the decision of the Court of Appeals of Georgia affirming the decision of the trial court to overrule Petitioner's motion to suppress evidence seized during a search conducted by hotel security officers. Further facts will be presented in the body of this brief relating to the conduct of the search by the security officers.

PART TWO

REASON FOR NOT GRANTING THE WRIT

THE MOTION TO SUPPRESS WAS PROPERLY OVERRULED BY THE TRIAL COURT IN ACCORDANCE WITH THE STANDARDS OF THE PLAIN VIEW DOCTRINE.

Petitioner asserts that this Court's decision in United States v. Chadwick, 433 U.S. 1 (1977) needs to be explicated to resolve whether or not the search of his misplaced briefcase was an unreasonable search and seizure in violation of the Fourth Amendment. Respondent asserts that the facts of this case fall within well-settled principles of law in the Fourth Amendment area, specifically, those cases where there is an inadvertent discovery of an incriminating object which is in plain view. The State asserts that this case is distinguishable from the facts in United States v. Chadwick, supra, and was properly held by the Court of Appeals of Georgia to be governed by such cases as Ker v. California, 374 U.S. 23 (1963), decided by this Court, cited in such Georgia cases as Brooks v. State, 129 Ga. App. 383 (1973).

Under the principles of Cooper v. California, 386 U.S. 58 (1967), the main question to be determined in cases dealing with the Fourth Amendment is whether or not under all of the circumstances of the case, the search or seizure is reasonable. In Ker v. California, 374 U.S. 23, 33 (1963), this Court stated:

> "We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in light of the fundamental criteria laid down by the Fourth Amendment and in opinions of this Court applying the Amendment."

Petitioner admits under certain circumstances, warrantless search and seizures are valid, citing United States v. Edwards, 415 U.S. 800 (1974) and Coolidge v. New Hampshire, 403 U.S. 443 (1971). Respondent asserts that the circumstances in the instant case were properly held by the Court of Appeals of Georgia to have authorized the search of Petitioner's briefcase.

The facts of the case need not be reiterated at this time as they were fully set forth in the decision of the Court of Appeals of Georgia, attached as Appendix A to Petitioner's brief. However, several facts should be stressed in evaluating Petitioner's claims. First, Petitioner's briefcase, which was unlocked, was mislaid in the lobby of the Hyatt Regency Hotel. Another person, other than the Petitioner inquired concerning the briefcase. Petitioner was unable to produce any identification, stating that his identification was inside the briefcase. The hotel manager was concerned over the large amount of money which the briefcase contained.

According to security person, W. F. Derrick, the briefcase was partially open at the time he opened the briefcase in order to get the billfold

inside to ascertain the identification of the owner of the briefcase. Officer Derrick was not attempting to search for any incriminating evidence against the Petitioner, but instead, inadvertently discovered the marijuana in plain view after opening the briefcase to locate identification for the Petitioner.

The Court of Appeals of Georgia noted, but rejected, Petitioner's claim that the principles enunciated by this Court in United States v. Chadwick, 433 U.S. 1 (1977) were applicable in the instant case, finding the two cases to be distinguishable. The differences between the facts in United States v. Chadwick, supra, and the instant case are readily apparent. In Chadwick, federal agents made a warrantless search of a locked footlocker belonging to one of the defendants and in his possession, in the federal building, approximately an hour after the defendant's arrest. The Court of Appeals of Georgia highlighted as distinguishing factors, the lack of an arrest of the Petitioner and the fact that the briefcase was not "in his possession."

It should also be noted that in United States v. Chadwick, supra, the defendants were arrested on the basis of the possibility that they were drug traffickers and the federal agents were seeking to discover incriminating evidence against the defendants by searching the double-locked footlocker. In the instant case, Petitioner was not a suspect in any crime, nor were the security officers seeking to discover incriminating evidence against the Petitioner. The Georgia Court of Appeals correctly distinguished this case from

the case cited by Petitioner as being applicable to the facts present in this case. Therefore, the privacy interest of Petitioner in his misplaced briefcase was not the same privacy interest as existed in United States v. Chadwick, supra.

Petitioner asserts that the "intrusion" into Petitioner's briefcase was illegal, as Petitioner claims his briefcase was neither abandoned nor lost, but misplaced. However, Respondent asserts that this intrusion was not only legal but mandatory based on the statutory duty, cited by the Court of Appeals of Georgia, of innkeepers to their guests concerning property which comes in the possession of the innkeepers. See Ga. Code Ann. § 52-108 and § 52-109. This statutory duty of innkeepers transforms what could be an illegal intrusion under certain circumstances, into a legal intrusion, necessary under the particular circumstances of this case.

Petitioner asserts that he had already been established as the owner of the briefcase at the time of this intrusion, but this contention is controverted by the record. Specifically controverting this contention is the fact that Petitioner was not the only person inquiring concerning the briefcase, nor could Petitioner comply with the hotel policy to produce personal identification not contained in the lost or misplaced object.

Petitioner also asserts that the intrusion was illegal as he did not consent to the intrusion. The question of consent is immaterial to an evaluation of the reasonableness of this search, as the hotel security officers were attempting

to determine the ownership of the briefcase at the time that the marijuana was discovered in plain view. The security officers needed no consent to take actions to determine the proper owner of the briefcase.

The substance in the instant case was discovered in full accordance with the plain view doctrine recognized by this Court in Coolidge v. New Hampshire, 403 U.S. 443 (1971). The plain view doctrine has been followed in many circuits, e.g., U.S. v. Mason, 523 F.2d 1122 (D.C. Cir. 1975), U.S. v. Green, 474 F.2d 1385 (5th Cir. 1973), U.S. v. Truitt, 521 F.2d 1174 (6th Cir. 1975), U.S. v. Cooks, 493 F.2d 668 (7th Cir. 1974), U.S. v. Johnson, 541 F.2d 1311 (8th Cir. 1976), U.S. v. Sedillo, 496 F.2d 151 (9th Cir. 1974).

Petitioner has asserted that the plain view doctrine is inapplicable but Respondent contends that the facts of this case fall squarely within the plain view doctrine. As the initial intrusion into the briefcase was both legal and required under the statutory duty for inn-keepers set forth in Georgia law, the first requirement for establishing a valid plain view search has been met. See Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971).

The second requirement for a valid plain view search under Coolidge v. New Hampshire, supra, is that the discovery of the evidence must be inadvertent. Coolidge v. New Hampshire, supra, at 469-470. The Court of Appeals of Georgia cited a Georgia case, Lowe v. State, 230 Ga. 134 (1973), applying the principles of Coolidge v. New Hampshire, supra. The Georgia Court of Appeals noted that in Lowe v. State, supra, a police

officer present at the scene where a house was burning was given the responsibility for keeping items in defendant's car, papers and a money bag, safe. He took and inventoried these items which he found in plain view in the car's floor. The Court of Appeals concluded that this inadvertent discovery, was devoid of any of unreasonableness outlawed by the Fourth Amendment and decisions interpreting this amendment.

The inadvertent discovery of the marijuana by the security officer in the instant case, while attempting to determine ownership of the breifcase, was similarly devoid of any unreasonable-ness. The security officer was not attempting to locate incriminating evidence to be used against the Petitioner but was instead, trying to authenticate the identity of the Petitioner as the owner of the briefcase. After having opened the briefcase wider to get the billfold out of the case, the security officer observed the marijuana in plain view inside the briefcase. There is no question that the third requirement of Coolidge, that it must be immediately apparent that the items discovered constituted evidence of a crime, was met in this case. Marijuana is immediately recognizable as a substance whose possession is illegal.

The seizure of the marijuana was clearly within the plain view doctrine as set forth in Coolidge v. New Hampshire, supra and numerous other decisions of this Court including Harris v. United States, 390 U.S. 234, 236 (1968); Ker v. California, 374 U.S. 23, 43 (1963); Frazier v. Cupp, 394 U.S. 731 (1969).

The decision of the Court of Appeals was clearly consistent with the established authority of this Court in the Fourth Amendment area and properly determined that Petitioner's constitutional rights were not violated.

CONCLUSION

Respondent respectfully requests that this Court deny Petitioner a writ of certiorari as there was no violation of Petitioner's constitutional rights in the inadvertent discovery of marijuana by hotel security officers in attempting to discover the owner of a misplaced briefcase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Susan V. Boleyn, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for the Respondent in Opposition by depositing three copies of same in the United States mail, with proper address and adequate postage to:

Mr. Edward T.M. Garland
1012 Candler Building
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This 20th day of February, 1980.

SUSAN V. BOLEYN